SUBJECT INDEX.

	Page.
Opinions below	1
Jurisdiction	1- 2
Question presented	2
Statement of the case	2- 3
Argument	4- 6
Conclusion	6
Appendix	7-21

Authorities.

Benton v. United States, 80 F. (2d) 162 (C. C. A. 4)	5
Blitz v. United States, 153 U. S. 308	6
Brasfield v. United States, 272 U. S. 448, 450	4
Clyatt v. United States, 197 U. S. 207, 220 et seq.	4
Connley v. United States, 46 F. (2d) 63 (C. C. A. 9)	5
Crawford v. United States, 212 U. S. 183, 194	4
New York Central R. Company v. Johnson, 279 U. S. 310, 318	4
Paraiso v. United States, 207 U. S. 368	5
Rossi v. United States, 60 F. (2d) 995	5
United States v. Atkinson, 297 U. S. 157, 160	4
United States v. Dibella, 28 F. (2d) 805 (C. C. A. 2)	5
United States v. Stafoff, 260 U. S. 477	5
Weems v. United States, 217 U. S. 349, 362	4, 5
Wilborg v. United States, 163 U. S. 632 et seq.	4

In The

Supreme Court of the United States

October Term, 1937.

No. .....

HARRY FLEISHER, SAM FLEISHER and JOSEPH STEIN,

Petitioners,

v.

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Opinions Below.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 35-37) has not yet been reported.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered June 3, 1937 (R. 34). The petition for writs of

certiorari was filed July 8, 1937. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28, U. S. C. A); also Rule XI of the Criminal Appeals Rules promulgated by this court May 7, 1934.

Order allowing certiorari filed October 11, 1937 (R. 38).

Question Presented.

Whether the first count of the indictment states an offense under Federal Law.

Statement Of the Case.

Petitioners were indicted with others, in the District Court of the United States for the Eastern District of Michigan on four counts of an indictment, the question involved in this case being limited to the first count. The first count of the indictment charges that from October 1, 1934 to including the time of filing indictment, the defendants unlawfully conspired together to possess, and cause to be possessed certain stills and the distilling apparatus for the production of distilled spirits, and to cause the same to be set up without having the same registered with the Collector of Internal Revenue as required by law (R. 1-2).

Appellants were convicted on count one together with the other counts in the indictment (R. 9-11) and each was sentenced to two years imprisonment and to pay a fine of

$5000.00 on each count, the prison sentences to run consecutively and the fines to be cumulative (R. 9-11). Separate appeals were taken to the Circuit Court of Appeals for the Sixth Circuit (R. 12-23), and the convictions and sentences were there affirmed (R. 34).

ARGUMENT.

The brief on behalf of the Government sets up *in limine,* and points out, for the first time in this cause: "that the first count in the indictment charged that the object of the conspiracy was a failure to register certain stills with the Collector of Internal Revenue, whereas the charge should be that the object of the conspiracy was a failure to register the stills with the District Supervisor of the Alcohol Tax Unit, in the Bureau of Internal Revenue, as required by law and regulations." Appellants are in accord with the brief of the Government, and file this brief in the hope that the additional authorities herein cited may be of some assistance to this court.

1. It is admitted that this point was not raised in the courts below, nor was it mentioned in the petition for writs of certiorari, or in the supporting brief. It has been held that this question is one arising upon the face of the record and may undoubtedly be considered by this court.

United States v. Atkinson, 297 U. S. 157, 160;
New York Central R. Company v. Johnson, 279 U. S. 310, 318;
Brasfield v. United States, 272 U. S. 448, 450;
Wilborg v. United States, 163 U. S. 632 et seq.;
Cliyatt v. United States, 197 U. S. 207, 220 et seq.;
Crawford v. United States, 212 U. S. 183, 194;
Weems v. United States, 217 U. S. 349, 362.

Though *Paraiso v. United States, 207 U. S. 368,* seems to be contra to the above cases, *Weems v. United States, 217 U. S. 349, 362,* cites *Paraiso v. United Stats, supra,* and holds with the above authorities. Though the *United States v. Dibella, 28 F. (2d) 805 (C. C. A. 2),* seems to be the other authority to some extent not in accord with the foregoing; it is distinguished in *Connley v. United States, 46 F. (2d) 63 (C. C. A. 9).*

2. The law seems to be well settled that a charge of failure to register a still with the Collector of Internal Revenue states no offense. The brief of the United States on page 5 cites numerous authorities which are clearly to this effect. In the appendix attached hereto, we have set forth the note to *Benton v. United States, 80 F. (2d) 162 (C. C. A. 4)* which note very aptly traces the history of the various acts and the executive order which created the duty to register stills with the District Supervisor of the Alcohol Tax Unit, so that failure to register stills with the Collector of Internal Revenue could not be the basis of a charge of crime. In addition thereto set forth in the appendix will be found excerpts from the various acts and executive order and regulations involved in this question.

See also:

United States v. Stafoff, 260 U. S. 477;
Rossi v. United States, 60 F. (2d) 995.

3. Another question raised in the brief on behalf of the Government is that the sentences of imprisonment on count two should be amended so as to make their date of commencement definite, and it would seem that the term of imprisonment on count two should commence

from the date fixed by the judgment of the court below (R. 9-12) and imprisonment to begin under the sentence on the first count, should the first count be reversed by this court.

Blitz v. United States, 153 U. S. 308.

CONCLUSION.

It is the contention of appellants that the sentences and judgments of the District Court as to count one should be reversed and that the sentences of imprisonment should be amended and the remaining counts should commence with count two commencing *nunc pro tunc* as of the date of the sentences, to-wit, April 15, 1936.

Respectfully submitted,

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APPENDIX.

BENTON v. UNITED STATES, 80 FEDERAL REPORTER, 2D SERIES, PAGES 163-164, NOTES.

Registration of Stills.

The Reorganization Act of March 3, 1927, Section 1, 44 Stat. 1381, 5 U. S. C. A., § 281, created a bureau in the Treasury Department to be known as the Bureau of Prohibition, with a Commissioner of Prohibition at its head. Sections 4 and 5 of the act, 5 U. S. C. A., § 281-c and 281-d, provided that the rights and duties conferred upon the Commissioner of Internal Revenue and his assistants by any law in respect, inter alia, to the production of intoxicating liquors, should be transferred to and imposed upon the Secretary of the Treasury; and the Secretary was authorized to confer or impose any of such rights and duties upon the Commissioner of Prohibition or Commissioner of Internal Revenue or their respective assistants. On April 1, 1927, the Secretary issued Bureau of Prohibition Treasury Decision No. 1 (see Regulations 2 relating to permits promulgated April 1, 1931, p. 219), which provided in paragraph IV (2) (a) that there should be conferred and imposed upon the Commissioner of Prohibition all the rights and duties conferred or imposed upon the Commissioner of Internal Revenue by any law insofar as they related to the production of distilled spirits. Thereby the duty of registering stills was delegated to the Commissioner of Prohibition. Shortly after the passage of the Reorganization Act, District Prohibition Administrators were appointed, and the duty of registering stills was imposed

upon them. This action was confirmed by Article 18 of Regulations No. 3 relative to industrial alcohol promulgated by the Treasury Department on October 1, 1927.

The Prohibition Reorganization Act of May 27, 1930, 46 Stat. 427, 27 U. S. C. A., §§ 101 to 108, created a Bureau of Prohibition in the Department of Justice, with a Director of Prohibition at its head, and transferred certain duties with reference to the enforcement of the prohibition laws from the Secretary of the Treasury to the Attorney-General. The registration of stills was not taken away, but remained with the Secretary of the Treasury. Section 5 of the act, 27 U. S. C. A., § 105, however, provided for the repeal of regulations in force prior to July 1, 1930, and the issuance of new regulations by the Attorney-General and the Secretary of the Treasury, with regard, amongst other things, to the form of all applications. Thereupon, Bureau of Prohibition Treasury Decision 54, effective July 1, 1930, was promulgated whereby the duties of prohibition administrators within their respective districts were transferred to supervisors of permits, and Regulations No. 3, relative to industrial alcohol, effective April 1, 1931, provided by Article 14 that every person having in his possession or custody any still should register the same in quadruplicate with the supervisor of the district in which it was set up, and Article 4 (p) provided that "supervisor" should mean the supervisor of permits in the Bureau of Industrial Alcohol.

Thereafter, by the Act of March 3, 1933, 47 Stat. 1517, 5 U. S. C. A., §§ 124 to 130, the President was empowered to regroup the agencies of the Government, and by Executive Order 6639, which became effective May 10, 1934, 5 U. S. C. A., § 132, note, the President directed that the Bureau of Industrial Alcohol and the office of the Commissioner of Industrial Alcohol should be abolished and

the rights and powers imposed upon him should be transferred to and held by the Commissioner of Internal Revenue. The order also provided that the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury, should prescribe all regulations under the provisions of the National Prohibition Act and laws amendatory thereof, which had not been rendered inoperative by the repeal of the Eighteenth Amendment, relating to the form of all applications, etc. On May 10, 1934, the Commissioner of Internal Revenue, pursuant to this authority, issued Treasury Decision No. 4432 (Internal Revenue Bulletin, January-June, 1934, p. 534), of which paragraphs 1 and 2 created in the Bureau of Internal Revenue an Alcohol Tax Unit with a Deputy Commissioner at its head charged, inter alia, with administration of internal revenue laws relating to the production of distilled spirits. Paragraph 3 imposed upon the Deputy Commissioner in charge of the Alcohol Tax Unit, and his assistants, all the rights and duties conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue, under the provisions of Executive Order 6639 (5 U. S. C. A., § 132 note) and Section 4 (a) of the Reorganization Act of March 3, 1927 (5 U. S. C. A., § 281-c (a), insofar as they related to the duties to be performed under said paragraph 2. The rights and duties thus conferred upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol Unit, included the right and duty to receive the registration of stills which had been imposed upon the supervisor of the district on July 1, 1930, and had remained with him until the abolition of the Bureau of Industrial Alcohol by Executive Order 6639 on May 10, 1934. Paragraph 4 of Treasury Decision 4432, however, provided that all regulations prescribed for the enforcement of the laws theretofore administered by the Commissioner of Industrial Alcohol or the Bureau of Industrial Alcohol and his

assistants should continue in effect as regulations of the Bureau of Internal Revenue, and provided that the term "Supervisor or Supervisor of Permits," whenever used in such regulations, should be held to mean "District Supervisor." The effect of the decision, therefore, was that the power and duty of registering stills devolved upon the District Supervisor of the Alcohol Tax Unit, as the agent and assistant of the Deputy Commissioner of Internal Revenue. It is required that the registration of a still be made in quadruplicate, and that one copy be sent to the collector of internal revenue of the district, who continues to have jurisdiction over the collection of the tax. (See Regulations 8 concerning the manufacture of whisky, page 4.)

REORGANIZATION ACT OF MARCH 3rd, 1927.

(44 Stat. 1381.)

Chap. 348. An Act To Create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. * * *

Sec. 4. (a) The rights, privileges, powers and duties, conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs, or by the National Prohibition Act, as amended, or any other law relating to the enforcement of the eight-

eenth amendment, are hereby transferred to and conferred and imposed upon the Secretary of the Treasury.

(b) The Secretary of the Treasury is authorized to confer or impose any of such rights, privileges, powers, and duties upon the Commissioner of Prohibition, or any of the officers or employees of the Bureau of Prohibition, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes.

Sec. 5. (a) The Secretary of the Treasury is authorized to transfer to the Bureau of Prohibition such records, property (including office equipment), and personnel of the office of the Commissioner of Internal Revenue as may be necessary for the exercise by the Bureau of Prohibition of the functions vested in it.

(b) The Commissioner of Prohibition, with the approval of the Secretary of the Treasury, is authorized to appoint in the Bureau of Prohibition such employees in the field service as he may deem necessary, but all appointments of such employees shall be made subject to the provisions of the civil service laws, notwithstanding the provisions of Section 38 of the National Prohibition Act, as amended. The term of office of any person who is transferred, under this section, to the Bureau of Prohibition, and who was not appointed subject to the provisions of the provisions of the civil service laws, expire upon the expiration of six months from the effective date of the Act.

* * *

PROHIBITION REORGANIZATION ACT OF MAY 27, 1930.

(46 Stat. 427.)

Chap. 342—An Act To transfer to the Attorney-General certain functions in the administration of the National Prohibition Act, to create a Bureau of Prohibition in the Department of Justice, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Prohibition Reorganization Act of 1930."

• • •

Sec. 5. (a) The Attorney-General and the Secretary of the Treasury shall jointly prescribe all regulations under this Act and the National Prohibition Act relating to permits, and the form of all applications, bonds, permits, records and reports, under such Acts. *Provided, That all regulations relating to the Bureau of Prohibition in the Department of Justice shall be made by the Attorney-General.*

(b) Regulations in force prior to the effective date of the Act shall not be in force thereafter unless prescribed and issued in accordance with the provisions of paragraph (a) of this section; but the repeal of such regulations shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred thereunder. Nothing in this act shall affect the terms or conditions of any permit or bond given prior to the effective date of this Act.

• • •

U. S. TREASURY DEPARTMENT
BUREAU OF INDUSTRIAL ALCOHOL.
REGULATIONS NO. 3.
Relative to the Production, Tax Payment, etc., of INDUSTRIAL ALCOHOL and to the Manufacture, Sale and Use of DENATURED ALCOHOL.

Under Title III of the National Prohibition Act of October 28, 1919, Prescribed Jointly by the Secretary of the Treasury and the Attorney-General of the United States Under the Prohibition Reorganization Act of 1930.

Effective April 1, 1931.

REGULATIONS PRESCRIBED.

Article 1. Pursuant to the provisions of the National Prohibition Act, as amended and supplemented, the following regulations are prescribed to govern the manufacture and distribution of industrial alcohol, and the manufacture, sale, use and export of denatured alcohol:

* * *

REGISTRY OF STILLS.

Art. 14. Every person, including the proprietor of an industrial alcohol plant, having in his possession or custody, or under his control, any still or distilling apparatus set up, except retorts for the production of wood alcohol and glass laboratory stills of small capacity, shall register the same in quadruplicate on Form 26 with the supervisor of the district in which set up, except where such stills have heretofore been registered and no change in ownership, possession, custody, con-

trol, or location has occurred since such registry. The original copy of Form 26 will be retained by the supervisor for his files. One copy of the form will be forwarded to the commissioner, one copy with notation of receipt thereon will be returned by the supervisor to the registrant, and one copy will be sent to the collector of internal revenue of the district in which the still was manufactured. The registrant must retain the copy returned to him at the place of registration, so that the same will be available for inspection by visiting Government officers.

* * *

ACT OF MARCH 3rd, 1933.

(47 Stat. 1518.)

"Power of President.

"Sec. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by executive order—

"(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

"(b) Consolidate the functions vested in any executive agency; or

"(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

"(d) Designate and fix the name and functions of any consolidated activity or executive agency and the

title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof."

EXECUTIVE ORDER NO. 6639.

TRANSFER OF FUNCTIONS.

1. (a) The Bureau of Industrial Alcohol and the Office of Commissioner of Industrial Alcohol are abolished, and the authority, rights, privileges, powers and duties, conferred and imposed by law upon the Commissioner of Industrial Alcohol are transferred to and shall be held, exercised, and performed by the Commissioner of Internal Revenue, and his assistants, agents, and inspectors, under the direction of the Secretary of the Treasury.

(b) The authority, rights, privileges, powers and duties, conferred and imposed upon the Attorney-General by the Act of May 27, 1930 (ch. 343, 46 Stat. 427), entitled "An Act to transfer to the Attorney-General certain functions in the administration of the National Prohibition Act, to create a Bureau of Prohibition in the Department of Justice, and for other purposes," so far as they are required to, or may, be exercised and performed under existing law, are transferred to and shall be held, exercised, and performed by the Commissioner of Internal Revenue, and his assistants, agents, and inspectors, under the direction of the Secretary of the Treasury. *Provided,* That the Attorney-General shall continue to exercise the power and authority (a) to remit or mitigate forfeitures under the Internal Revenue laws and to determine liability for Internal Revenue taxes and penalties, in connection with the violations

of the National Prohibition Act occurring prior to the repeal of the eighteenth amendment, and (b) to institute suits upon any cause of action under the National Prohibition Act, or under the Internal Revenue laws involving a violation of the National Prohibition Act, arising prior to, and/or not affected by, the repeal of the eighteenth amendment, and to compromise any such cause of action before or after suit is brought. *And provided further,* That the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury, shall prescribe all regulations under the provisions of the National Prohibition Act, and all laws amendatory thereof or supplementary thereto, which were not rendered inoperative by the repeal of the eighteenth amendment, relating to permits, and he shall prescribe the form of all applications, bonds, permits, records and reports, under such acts.

TRANSFER OF OFFICIAL RECORDS AND PROPERTY.

2. (a) The official records and papers on file in, and pertaining to the business of, the Bureau of Industrial Alcohol, together with the supplies, furniture, equipment, and other property of the United States in use in such Bureau, are transferred to the Bureau of Internal Revenue.

(b) The official records and papers on file in the Department of Justice pertaining to the functions transferred by this order to the Commissioner of Internal Revenue, together with supplies, furniture, equipment, and other property of the United States in use in said Department in connection with the performance of such functions, are transferred to the Bureau of Internal Revenue.

TRANSFER OF PERSONNEL.

3. (a) The officers and employees employed in, or under the jurisdiction of, the Bureau of Industrial Alcohol, are transferred to the Bureau of Internal Revenue, without change in classification of compensation.

(b) The officers and employees employed in, or under the jurisdiction of, the Alcohol Beverage Unit of the Division of Investigation, Department of Justice, except those employed in, or under the jurisdiction of, the taxes and penalties section of said Unit, are transferred to the Bureau of Internal Revenue without change in classification or compensation.

(c) Officers and employees transferred to the Bureau of Internal Revenue hereunder, who do not already possess a competitive classified civil service status, shall not acquire such status by reason of such transfer, except upon recommendation by the Secretary of the Treasury to the Civil Service Commission, subject to such noncompetitive tests of fitness as the commission may prescribe; and no officer or employee so transferred may be retained in the Bureau of Internal Revenue without appropriate civil service status for a period longer than 60 days from the effective date of this order.

TRANSFER OF APPROPRIATIONS.

4. The unexpended balances of appropriations for the Bureau of Industrial Alcohol and the field service thereunder, and the unexpended balances of the appropriations made for salaries and expenses, Bureau of Prohibition, Department of Justice including the field service thereof, insofar as may be required for the performance of the functions transferred by this order to the Commissioner of Internal Revenue shall be transferred on the books of the Treasury Department to the

appropriation entitled "Collecting the Internal Revenue," which shall thereafter be available in the Bureau of Internal Revenue as a single fund for expenditure for the purposes named in the laws making the separate appropriations for "Salaries and Expenses, Bureau of Industrial Alcohol, Treasury Department," "Salaries and Expenses, Bureau of Prohibition, Department of Justice" and "Collecting the Internal Revenue," respectively; and appropriations, if any, made to the Bureau of Industrial Alcohol and the Department of Justice, respectively, for the fiscal year 1935, for the performance of the functions transferred by this order to the Bureau of Internal Revenue, shall likewise be transferred on the books of the Treasury Department to the appropriation "Collecting the Internal Revenue," subject to the conditions herein set forth.

GENERAL PROVISIONS.

5. Executive Orders Numbered 6166, 6224 and 6540, dated June 10, 1933, July 27, 1933, and December 28, 1933, respectively, are revoked insofar as they are in conflict with the provisions of this order.

6. This order shall take effect upon the sixty-first calendar day after its transmission to Congress, unless otherwise determined in accordance with law. (Promulgated March 10, 1934, pursuant to Section 126 of Title 5.)

(T. D. 4432)

Alcohol Tax Unit.

Establishing An Alcohol Tax Unit in the Bureau of Internal Revenue, and Defining Its Jurisdiction.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE.

Washington, D. C.

To Officers and Employees of the Bureau of Internal Revenue, Collectors of Internal Revenue, and Others Concerned:

1. There is hereby established in the Bureau of Internal Revenue a unit to be known as the Alcohol Tax Unit, at the head of which shall be a Deputy Commissioner of Internal Revenue appointed as required by law.

2. The Alcohol Tax Unit shall be charged with the administration, under the direction of the Commissioner of Internal Revenue, of the internal revenue laws concerning the following subjects:

(a) The production, custody, and supervision of distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids.

(b) The establishment, construction, operation, custody and supervision of distilleries, industrial-alcohol plants, bonded warehouses, denaturing plants, wineries, bonded-wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits, liquors, or liquids are produced or stored.

(c) The determination, assertion and assessment of all internal revenue taxes and penalties pertaining to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, and the compromise thereof, except that all moneys shall be received and accounted for by the collectors of internal revenue under the direction of the Commissioner of Internal Revenue.

(d) Inquiries and investigations relating to the filing of returns for occupational and commodity taxes and penalties in respect to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, except that the collectors of internal revenue will remain charged with the routine inspection of the places of business of retail dealers in such liquors and liquids.

(e) The investigation, prevention, and detection of violations of the laws pertaining to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, or any regulations issued thereunder, and the apprehension of offenders against such laws.

(f) The detention and seizure, for violation of laws relating to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, of property, whether real or personal (except seizure under distraint warrant), and the custody, control, sale and disposition of property so seized.

(g) The discharge of liens under Section 902 of the Revenue Act of 1926.

3. There are conferred and imposed upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit, and the assistant inspectors and agents under

his supervision, subject to the direction of the Commissioner of Internal Revenue, and subject to such regulations as he may prescribe from time to time with the approval of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred and imposed upon the Secretary of the Treasury and/or the Commissioner of Internal Revenue under the provisions of the Executive order of March 10, 1934 (No. 6639), and of Section 4 (a) of the act approved March 3, 1927, entitled "An Act to create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury," insofar as they relate to the duties to be performed by the Alcohol Tax Unit as enumerated in paragraph 2 hereof.

4. Except as may hereafter be otherwise provided, all regulations prescribed, all orders and instructions issued, and all forms adopted for the enforcement of the laws heretofore administered by the Commissioner of Industrial Alcohol or the Bureau of Industrial Alcohol, and assistants, inspectors, and agents thereunder, and remaining in effect after the repeal of the eighteenth amendment, will continue in effect as regulations, orders, instructions, and forms of the Bureau of Internal Revenue: *Provided*, That the term "Commissioner" or "Commissioner of Industrial Alcohol" and the term "Supervisor" or "Supervisor of Permits," wherever used in such regulations, orders, instructions, and forms, shall be held to mean, respectively, "Deputy Commissioner of Internal Revenue" and "District Supervisor."

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 10, 1934:
HENRY MORGENTHAU, JR.,
Secretary of the Treasury.